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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

AMOCO PRODUCTION COMPANY, on behalf of itself and the class it represents,*
Petitioners,

v.

SOUTHERN UTE INDIAN TRIBE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS

G. R. MILLER
McDANIEL, BATY & MILLER, LLC
1040 Main Avenue
P.O. Box 1157
Durango, CO 81302
(970) 247-1113
Counsel for Certain Named Class Members

CARTER G. PHILLIPS **
STEPHEN B. KINNAIRD
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

CHARLES L. KAISER
ANTHONY J. SHAHEEN
DAVIS, GRAHAM & STUBBS LLP
Suite 4700
370 Seventeenth Street
Denver, CO 80202
(303) 892-9400

GARY L. PAULSON
REBECCA S. McGEE
DAVID E. BRODY
AMOCO CORPORATION
1670 Broadway
Denver, CO 80201
(303) 830-4040
Counsel for Petitioner Amoco Production Company (class representative)

* Named class members listed in Appendix J to the Petition for Certiorari.

** Counsel of Record

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REPLY BRIEF OF PETITIONERS

As numerous *amici curiae* attest, including the five States primarily affected by the decision below, resolution of who owns coalbed gas in lands patented under the Coal Land Acts of 1909 and 1910, 30 U.S.C. §§ 81, 83-85 ("1909 and 1910 Acts"), is critical to the future of an important and growing national industry, as well as to the financial welfare of thousands of landowners and industry stakeholders. No arguments in the briefs in opposition detract from the national significance of this case or justify the decision of the Tenth Circuit.

Indeed, the only revelation in the briefs is the extraordinary step that the Department of Interior, intent on preserving at all costs a ruling in favor of the Southern Ute Tribe ("Tribe"), has taken in an attempt to short-circuit this Court's review: namely, the issuance, on the date the brief of the United States was due, of a one-sentence order withdrawing a binding opinion of the Solicitor of Interior of 17 years' standing on which the coalbed gas industry was built. U.S. Br. App. 1a.

This was an opinion adopted after a thorough analysis of the statutory language, context, and history that was intended to encourage the development of a desperately needed energy source in the wake of the energy crisis in the late 1970s. It succeeded remarkably, and billions of dollars have been invested in reliance on that opinion. Interior now declares: "never mind," in an action without parallel in the Department's long history. In an age of cynicism, it is difficult to imagine a more blatantly political and cynical act than Interior's one-line order. Petitioners, many of whom are individuals of modest means who have had royalty payments withheld since the panel decision below and are suffering immediate and real harm from the government's breathtaking reversal of position, urge the Court not to permit the federal government successfully to engage in gamesmanship in manipulating this Court's docket. If the federal government really believes that the 1909 Congress meant to reserve

gas when it reserved coal, then let the issue be briefed and decided by this Court on the merits now.

I. Respondents contend that petitioners exaggerate the impact of the decision below. Tribe Br. 13-14; U.S. Br. 21. But the Court need not rely solely on the parties' representations to judge the importance of this case. Five States encompassing almost 90% of lands with coal reservations under the 1909 and 1910 Acts urge this Court to grant a writ of certiorari . They emphasize the economic dislocation, hardship to individual citizens, and tax impacts that flowed directly from the Tenth Circuit's judgment.[1] Counties where the consequences are the most dire also support immediate review by this Court. Moreover, *amici curiae* from across the coalbed gas industry—representing producers, pipelines, and landowners—uniformly attest to the industry disruption and uncertainty that the Tenth Circuit's decision has generated outside the lands contested in this case, notwithstanding passage of the Enzi Act.[2]

Predictably, the respondents vaguely suggest, without serious analysis, that the Enzi Act removes the need for immediate review by this Court. To the -contrary, the Act's proponents repeatedly emphasized its limited protection and the need for Supreme Court review of the Tenth Circuit's decision. See, *e.g.*, Cong. Rec. H10,937 (daily ed. Oct. 15, 1998) (remarks of Rep. Cubin) ("we

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1 *See Public Lands Statistics* 54-55 (1997) (state-by-state breakdown of land patents). These same States also contain the majority of the 4.35 million acres of land where oil and gas alone were reserved to the United States under the Act of July 17, 1914, 30 U.S.C. §§ 121-123. *See Public Lands Statistics*, at 54-55. Not only are 1914 Act lands properly considered, *see* Pet. 24 n.13, but, if anything, petitioner's estimate of 20 million affected acres may be too low. *See* Brief of *Amici Curiae* The Coalbed Methane Ad Hoc Committee *et al.* 2-3 ("Independent Producers Br."). Although the five *amici* States are the primary ones affected, 1909 and 1910 Act patents reserving coal have been issued for lands in 17 States, belying the Tribe's claim that this decision has only "local significance," Tribe Br. 13. *See Public Lands Statistics*, at 54.

2 Pub. L. No. 105-367, 112 Stat. 3313 (1998).

expect the United States Supreme Court will grant a writ of certiorari and decide the ownership question"); see also *id.* H10,938-39 (remarks of Reps. McInnis and Rahall). In any event, respondents' blindered focus on the impact of the Tenth Circuit decision on "[t]he current level of CBM development" (*i.e.*, existing wells), U.S. Br. 21, simply misses the point.

The major adverse effect of the Tenth Circuit's decision, undisputed by respondents, is that title to coalbed gas worth billions of dollars is now uncertain in 20 million acres of land in 17 States. Such widespread impairment of the alienability of property is intolerable in any circumstance, but it is especially pernicious in an industry founded on marketable title. See Mountain States Producers Br. 4. In particular, title uncertainty will retard the development of the coalbed gas industry in the 95% of 1909 and 1910 Act lands that are unleased. Cf. Tribe Br. 16 (acknowledging that only 5% of lands are subject to lease). Respondents' dismissal of the importance of unleased lands simply ignores the recent, dramatic changes of the coalbed gas industry.

Historically, the received wisdom was that coalbed gas was commercially recoverable only from "deep coalbeds," Pet. App. 142a; it was assumed that high pressure was necessary to keep sufficient quantities of gas from dissipating from the reservoir. Recently, independent producers in the Powder River Basin in Wyoming began prospecting for gas in shallow coalbeds for lack of any profitable alternatives. They struck paydirt; wells began producing gas in unexpectedly large quantities. A leasing frenzy ensued. See Louise Klee, *Market Watch: Powder River Pipeline Plans Proceed Even As Court Ruling Slows Drilling*, Inside F.E.R.C.'s Gas Market Report, Sep. 18, 1998, *available in* 1998 WL 10043286. As a result, 2250 wells have been drilled or permitted in Campbell County, Wyoming alone in the last three years. Independent Producers Br. 3.

Because of the Powder River Basin experience, the industry is actively exploring future coalbed gas "plays" in

lands never previously thought valuable. Cf. Bureau of Land Management, U.S. Dep't of Interior, 1 *Final Environmental Impact Statement, Record of Decision: Price Coalbed Methane Project* 1-1 (1997) (nearly 1000 prospective wells in the Uintah Basin in Utah). Development typically occurs rapidly if a "play" is discovered. But if title is uncertain, producers risk being held liable in trespass or conversion for all production, and earning no return on substantial upfront capital investment in wells and processing, gathering, and transportation facilities. Producers will either forgo the opportunity, or incur the deadweight cost of entering into expensive protective arrangements with both the coal and the gas owners. The Tribe calls for substantiation of this self-evident point, see Tribe Br. 15, but the Court has all the proof it needs in the numerous *amicus* briefs submitted in support of this petition. The industry participants who will conduct new exploration, production, and transportation of coalbed gas have represented to the Court that title uncertainty created by the decision below has interfered with and will restrict their development activity significantly.

The Court should act now to eliminate the unnecessary and costly legal risk that the Tenth Circuit injected into coalbed gas development.[3] There is no need to await a circuit split. First, it would be detrimental to the industry

[3] The Tribe argues that the Tenth Circuit's decision did not alter the legal landscape because it was consistent with a purported "majority rule" (*i.e.*, two of three state supreme courts) in cases deciding coalbed methane rights under certain private deeds. Tribe Br. 17 & n.6. Those cases turn on the deed language and state-law rules of deed construction, affect only the plots of land at issue, and have no bearing on the meaning of Congress' reservation of "coal" in the 1909 and 1910 Acts (as even the panel below admitted). Pet. App. 48a n.3. The only rule for 1909 and 1910 Act lands, in Alabama and elsewhere, was that established by the 1981 Solicitor's opinion: namely, that coalbed gas belonged to the patentee. Nor are any unresolved issues of state law, U.S. Br. 20, an impediment to coalbed gas development. That industry flourished in the wake of the Solicitor's opinion in 1981 without any apparent obstacles posed by state law. *See* Pet. 24-25.

to leave the ownership of gas unsettled for the years it would take another case to travel to this Court. Not only are the direct effects of the Tenth Circuit decision severe (because many of the major coal basins with known coalbed gas reserves are in that Circuit), but producers must account for the legal risk of title uncertainty in every State with 1909, 1910, or 1914 Act lands. Second, deferring consideration will yield little gain to this Court's review. The legal positions on each side have fully crystallized, and there are five legal opinions for the Court to draw upon (the 1981 Solicitor of Interior, the district court, the panel, the *en banc* majority, and the *en banc* dissenters). In addition, the importance of the issue ensures that the matter will be briefed not only by the parties, but also by numerous *amici*. Thus, the legal issue will be thoroughly vetted before the Court will decide it.

Indeed, the United States acknowedges that "in appropriate circumstances, [it] has asked this Court to address important public land issues in the absence of a circuit conflict." U.S. Br. 15 n.5. It declines to say what the "appropriate circumstances" were in those cases that are absent here. The United States does not dispute that this case involves far more valuable minerals than were at issue in *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36 (1983). See Pet. 23-24. Moreover, *Watt* v. *Alaska*, 451 U.S. 259 (1981), did not even involve title, but simply the statutory division of mineral leasing revenues. Contrary to respondents' claims, legislation will not resolve the question of title to coalbed gas. Even if Congress were to award title to the owner of the coal estate, the question of pre-existing title in the patentee would simply arise again in the form of takings claims. The fact that the United States may be the primary owner of still severed coal estates in 1909 and 1910 Act lands, U.S. Br. 22, also does not make curative legislation likely. Congress has already declined to relinquish to landowners any possible ownership claims to coalbed gas reserves worth billions of dollars in unleased lands. See Pub. L. No. 105-367, § (1)(b)(5).

Nor should review be delayed pending trial on the merits of the various equitable defenses petitioners have asserted. The critical and dispositive issue for review—the meaning of the reservation of "coal" in the 1909 and 1910 Acts—is strictly legal in nature and has been finally decided. Moreover, this case is many years away from final judgment. Not only must there first be resolution of the defenses "common" to all petitioners, but there will follow protracted discovery and trial on the *individual* defenses of the approximately 3,000 class members.

In addition, neither respondent even bothers to address the nationwide uncertainty created by the ruling below as to entitlement to federal tax credits for those with an economic interest in development of coalbed gas. See Pet. 27-28. Taxpayers—including royalty owners, producers, and investors in financial trusts—simply will not know the status of those credits. The silence of the United States on a major issue of federal tax liability is deafening.

Finally, even respondents cannot diminish the financial hardship to the almost 3,000 farmers and ranchers who have been deprived of the millions of dollars of needed royalty income escrowed in the wake of the decision below. Instead, the Tribe tries to pin the blame on Amoco and other producers, arguing illogically that royalties should have been escrowed earlier (thereby exacerbating the hardship). See Tribe Br. 18-19.[4]

The United States also faults petitioners, curiously relying on a statement in the 1981 Solicitor's opinion that it was not a warranty of title. U.S. Br. 24 (citing Pet. App. 159a). This states the obvious: no patentee has a

[4] Production on the reservation has also been adversely affected; Amoco alone has suspended investment projects that would have raised production by 20% by the year 2000. The Tribe's contrary claims are misleading; the 143 wells were drilled in 1992 largely because that was the last year that federal tax credits were available. As to the tenfold production increase, that owes almost entirely to the hundreds of wells drilled *prior* to the lawsuit, which entered peak production phases after early dewatering periods. *Cf.* La Plata County Br. App. 15a.

cause of action against the United States as grantor for breach of title warranty, see *Black's Law Dictionary* 1588 (6th ed. 1990), but that does not alter the fact that the 1981 opinion was issued to "resolve . . . who owns the coalbed gas in land where the coal or oil and gas was reserved to the United States." Pet. App. 142a. The United States further suggests that petitioners should have negotiated a 50-50 split of royalties between the gas and coal owners. See U.S. Br. 25. It is astonishing to fault property owners who do not surrender 50% of their wealth to foreclose any possible third party claim. This suggestion also ignores that the express purpose of the 1981 Solicitor's opinion was to "expedite development of this energy source" by resolving the title question that had "hindered any decision on how, and under what right of extraction, it can be developed." Pet. App. 142a.[5] The United States cannot escape the fact that the Department of Interior invited reliance on its 1981 opinion it now disavows. Indeed, it is ironic that the United States discounts petitioners' reliance, given that the Enzi Act was designed to preserve the very same reliance interests of others. See S. Rep. No. 105-408, at 2 (1998). The decision below has unsettled ownership of extremely valuable minerals and thwarted legitimate reliance interests, thus causing turmoil in the industry and hardship to individuals. This Court's review is unquestionably warranted.

II. The United States never explains its complete about-face in this litigation. On appeal, the United States "adopt[ed] Amoco Production Company's brief" in full on the meaning of the 1909 and 1910 Acts. Br. for Federal Appellees, No. 94-1579, 28 (May 19, 1995). Although the United States stated to the court of appeals *en banc*

[5] The Tribe's insinuation that the Solicitor issued the 1981 opinion in collusion with Amoco, Tribe Br. 5-6, is irresponsible, and not supported by the United States. First, the issue of coalbed gas ownership was before the Solicitor by virtue of an application of another producer. C.A. App. 2029-30. Amoco filed a lawsuit against the Department to compel administrative action after inordinate delay because it had 38 leases that were about to expire by operation of law. *See* C.A. App. 638, 2051, 2055, 2059.

that its prior views rested on the 1981 Solicitor's opinion, see Pet. App. 8a n.2; in fact, it had originally defended the district court's opinion based on "the plain meaning of 'coal,' the legislative history of the relevant Acts and their historical context, and finally, [] the 1981 Solicitor's Opinion to which the [district] court accorded deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." Federal Appellees Br. 28.

Not only has the United States abandoned the position taken below, but the Department of Interior has now withdrawn the 1981 Solicitor's opinion. The claim that the Department did so after legitimate reconsideration, U.S. Br. 25-26, is belied by the fact that the current Solicitor did not issue a contrary opinion in the 18 months since the panel decision was handed down, but instead issued a one-sentence retraction order on the date the brief of the United States was due in this Court. The withdrawal order is a transparent attempt to remove the *Chevron* issue from this case because the issue plainly was decided incorrectly below and warrants review for the reasons stated in the petition.[6]

The United States ties itself in knots trying to justify Interior's change of position. It assures the Court that the 1981 opinion "was reasonable at the time it was rendered," U.S. Br. 25, but not now in light of "current perspectives on statutory construction" and the opinion below, *id.* at 27. Petitioners are unaware of any sea change in statutory construction in the last 17 years, and the

[6] The assertion, U.S. Br. 19, that *Chevron* may not apply to post-conveyance determinations of title by Interior is unfounded. This Court long ago ruled that Interior is vested with "the control of all matters affecting the disposition of the public lands of the United States, and the adjustment of private claims to them under the legislation of Congress," precisely to ensure certainty of title. *Barden* v. *Northern Pac. R.R. Co.*, 154 U.S. 288, 326 (1894). The additional suggestion that the Court does not grant certiorari merely to review "application of *Chevron* principles" curiously overlooks *United States* v. *Haggar Apparel Company*, No. 97-2044.

critique by the United States of the 1981 opinion in light of the decision of the court of appeals is unpersuasive.

The United States wrongly attacks the 1981 opinion for supposedly focusing on the word "coal" and certain legislative colloquies without considering " 'the broader context of the statute as a whole.' " U.S. Br. 27 (quoting *Robinson* v. *Shell Oil Co.*, 117 S. Ct. 843, 846 (1997)). First, the word "coal" is the operative statutory language that identifies the mineral reserved to the United States; because Congress did not refer to natural gas found in coal formations in 1909, such gas belongs to the patentee.[7] Second, the charge is untrue, for the 1981 opinion examined not only the word "coal" and the legislative debates, but discussed at length the character of the minerals at issue, the entire historical context of the coal lands crisis resolved by the 1909 and 1910 Acts, and the progression of statutes dealing with mineral reservations and leasing. See Pet. App. 143a-52a.

The United States next takes the 1981 opinion to task for relying on a Pennsylvania trial court decision that was overruled. However, the Department of Interior, in an as yet unretracted 1990 Solicitor's opinion, subsequently declared that case irrelevant because it is based on Pennsylvania's unique geology and "stratum theory" of minerals

[7] The petition exposes the Tenth Circuit's misreading of contemporaneous texts that it claims suggest that coal was partly gas, *see* Pet. 18 n.7, and neither respondent answers that analysis. The Tribe instead contends there are "repeated references" to gaseous constituents of coal, but its lone example does not support its claim. Tribe Br. 24 (quoting IV *The American Cyclopaedia: A Popular Dictionary of General Knowledge* 726 (G. Ripley & C. Dana eds., 1883)). This source is not referring to hydrogen or oxygen found in a gaseous state in coal reservoirs; rather it is referring to the presence of hydrogen and oxygen in the atomic structure of *solid* coal. *See* IV *Cyclopaedia* at 726, 737-38. The Tribe also conveniently omits the fact that the entry begins by defining "coal" as a solid. *Id.* at 726. In addition, the Tribe's attempt to rely on the statutory reference to coal "deposits" does not support its analysis. *See Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 658 n.1 (1980).

ownership that is inapplicable to federal lands. Pet. App. 169a-71a.

Finally, the United States criticizes the 1981 opinion for failing to analyze congressional understanding of the scientific "origins, structure, and composition of coal" in 1909 and 1910. U.S. Br. 27. That criticism runs afoul of this Court's admonition that a "strictly scientific" definition of a mineral "is not the test contemplated by the statute," and that words identifying minerals should be given "their ordinary and popular sense." *Burke* v. *Southern Pac. R.R. Co.*, 234 U.S. 669, 679 (1914). In any case, not only is there nothing unique about the state of natural gas in coal (as the Solicitor of Interior concluded in his 1990 opinion), Pet. App. 165a, but also it is fanciful to think that the state of gas *in situ* in coal reservoirs had any effect on Congress in 1909 or 1910. See Horace C. Porter & F. K. Ovitz, *The Escape of Gas From Coal* 3 (1911) (Dep't of Interior, Bureau of Mines Technical Paper) ("little is known as to the condition of [methane] gas in the coal"). As set forth in the petition, Pet. 16-21, it is the court of appeals ruling, and not the 1981 Solicitor's opinion, that is an indefensible interpretation of the 1909 and 1910 Acts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

G. R. MILLER
McDANIEL, BATY & MILLER, LLC
1040 Main Avenue
P.O. Box 1157
Durango, CO 81302
(970) 247-1113
Counsel for Certain Named Class Members

CARTER G. PHILLIPS *
STEPHEN B. KINNAIRD
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

CHARLES L. KAISER
ANTHONY J. SHAHEEN
DAVIS, GRAHAM & STUBBS LLP
Suite 4700
370 Seventeenth Street
Denver, CO 80202
(303) 892-9400

GARY L. PAULSON
REBECCA S. McGEE
DAVID E. BRODY
AMOCO CORPORATION
1670 Broadway
Denver, CO 80201
(303) 830-4040
Counsel for Petitioner Amoco Production Company (class representative)

* Counsel of Record